CHAPTER 12

APPEALS

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12.1. GENERALLY

Decisions of judges and referees are subject to review by higher authority. Judicial officers, like the rest of us, have limits on their discretion. They must follow the law and make decisions reasonably based on the facts of a case as presented to the court. It is often difficult to interpret the law correctly and to apply a correct judgment to a set of facts. Errors will be made -- yes, even by the judiciary. Review by a higher authority sets limits on judges and referees and make them accountable for their actions. Mistakes in judgment or action can be remedied by higher authority.

An appeal, or a review of referee findings, should not be seen as a personal affront to the individual judge or referee. It is part of the job of judicial officers to face appellate review. Reasonable persons may differ on these cases. The judge calls it like he or she sees it and the resulting court orders must be honored. If, however, you strongly disagree with the court's actions, there are remedies that you should feel free to pursue. Michigan law provides for review of Juvenile Court actions through: review of referee recommendations (in Juvenile Court), rehearings (in Juvenile Court), and appeals to the Court of Appeals. Each of these is discussed below.

12.2. REVIEW OF REFEREE RECOMMENDATIONS

12.2.1. *Generally*

If a matter is heard by a referee, the referee does not enter orders, but rather makes recommendations to a judge who has the authority to enter orders. A party unhappy with the referee's recommendations may appeal an adverse finding to the judge.[1] The judge is required to review a referee's recommended findings and conclusion if requested by a party.

12.2.2. *Making the Request*

The request for review of either a referee recommendation or an order based on a referee recommendation must:

1. be in writing,
2. state the grounds for review, and

[1]. *In re AMB*, 248 Mich.App. 144 (2001)

3. be filed with the court within 7 days after the conclusion of the inquiry or hearing or within 7 days after the issuance of the referee's written recommendations, whichever is later, and[2]
4. be served on the interested parties by the person requesting review at the time of filing the request for review with the court. A proof of service must be filed.

NOTE: If the judge signs the order before the petition for review is filed, then the parties cannot file for a review of the referee's decision. The judge can sign the order whenever desired and is not required to wait 7 days to see if a petition for review is filed.

A party may file a written response to the request for review within 7 days after the filing.[3]

12.2.3. *Prompt Review Required*

Absent good cause for delay, the judge shall consider the request within 21 days after it is filed if the minor is in placement or detention. The rules do not spell out what constitutes "good cause" for delay. The judge need not schedule a hearing to rule on a request for review of a referee's recommendations.[4]

12.2.4. *Review Standard*

The review is *de novo*, meaning that, unlike the appeals to the Court of Appeals, the referee's decision is not given any presumption that it will be upheld. The judge may grant the review simply if he or she would have reached a different result. The court rule provides:

> The judge shall deny the request for review unless:
> (1) the judge would have reached a different result had he or she heard the case; or
> (2) the referee committed a clear error of law, which
> a. likely would have affected the outcome, or
> b. cannot otherwise be considered harmless.[5]

12.2.5. *Remedy*

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2. MCR 3.991(B)
3. MCR 3.991(C)
4. MCR 3.991(D)
5. MCR 3.991(E)

The judge may adopt, modify, or deny the recommendation of the referee in whole or in part, on the basis of the record and memoranda prepared, or may conduct a hearing, whichever the court in its discretion finds appropriate for the case.[6] The court may also stay any order pending its decision on review of the referee's recommendation.[7]

12.3. REHEARINGS

12.3.1. *Time and Grounds*

A party may seek a rehearing or new trial by filing a written motion stating the basis for the relief sought within 21 days after the date of the order resulting from the hearing or trial. The court may entertain an untimely motion for good cause shown. A motion will not be considered unless it presents a matter not previously presented to the court, or presented, but not previously considered by the court, which, if true, would cause the court to reconsider the case.[8]

12.3.2. *Making the Request*

All parties must be given notice of the motion in accordance with Rule 3.920, and any response by parties must be in writing and filed with the court and opposing parties within 7 days after notice of the motion.[9]

12.3.3. *Procedure on Motion for Rehearing*

The judge may affirm, modify, or vacate the decision previously made in whole or in part, on the basis of the record, the memoranda prepared, or a hearing on the motion, whichever the court in its discretion finds appropriate for the case.[10] The court need not hold a hearing before ruling on a motion for rehearing. If the court holds a hearing, it is to be conducted in accordance with the rules for dispositional hearings -- meaning in part that hearsay statements are admissible. At the discretion of the court, the motion hearing may be assigned to the person who conducted the original hearing. The court shall state the reasons for its decision on the motion on the record or in writing.[11] The court may stay any order pending a ruling on a motion for rehearing.[12]

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6. MCR 3.991(F)
7. MCR 3.991(G)
8. MCR 3.992(A)
9. MCR 3.992(B)&(C)
10. MCR 3.992(D)
11. MCR 3.992(E)
12. MCR 3.992(F)

Non-lawyers frequently have difficulty distinguishing between the motion for the rehearing and the rehearing itself. If the motion for rehearing is denied, the original order stands. If the motion for rehearing is granted, however, the way is clear for a new hearing on the previous issues which may require a separate court appearance.

12.4. APPEALS TO THE COURT OF APPEALS

12.4.1. *Appeal as a Matter of Right*

A party to a proceeding may appeal as a matter of right to the Court of Appeals an order of disposition placing a child under the supervision of the court or removing the child from his or her home or an order terminating parental rights.[13] Therefore parents or a child may appeal directly to the Court of Appeals if the court adjudicates their child a temporary ward of the court or places the child in out of home care. A party may also appeal "any final order." For instance, an order following trial finding that the court has no jurisdiction over a child is a final order that could be appealed by the petitioner or child's legal representative.

12.4.2. *Appeal by Leave to Court of Appeals*

All orders not listed in MCR 3.993(A) are appealable to the Court of Appeals by leave.[14] For example, upon denial of a petition to terminate parental rights, a petitioner or child's legal representative may apply for an appeal by leave or file a subsequent petition seeking termination of parental rights after gathering new evidence.[15]

12.4.3. *Notice of Right to Appeal*

Immediately after entry of an order terminating parental rights, the court is required to advise the respondent parent orally or in writing that respondent is entitled to appellate review of the order and that if respondent is financially unable to afford an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the portions of the transcript and record the attorney requires to appeal.[16] The request for assistance of an attorney must be made within 14 days after notice of the order is given or an order is entered denying a timely filed post judgment motion.[17] The court must then given a form to the respondent with the instructions (to be repeated on the form) that if the

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[13]. MCR 3.993(A)(1)&(2)
[14]. MCR 3.992(B)
[15]. *Santoskey v. Kramer,* 455 U.S. 745, 764 (1982); Miller, *Child Protective Proceedings Benchbook,* Michigan Judicial Institute, 1999, page 12-2
[16]. MCR 3.977(I)(a)&(b)
[17]. MCR 3.977(I)(c)

respondent desires the appointment of an attorney, the form must be returned to the court within the required period (to be stated on the form).[18]

12.4.4. *Time for Appeal*

The time limit for an appeal of right is jurisdictional.[19] An appeal of right must be filed within 14 days of the entry of the order or request for the appointment of an attorney must be made within 14 days after entry of the termination order or the decision on a timely postjudgment motion.[20]

An application for a delayed appeal from an order of the family division must be filed with 6 months after entry of the order, except that the Court of Appeals may not grant an application for leave to appeal an order of the family division terminating parental rights if filed more than 63 days after entry of an order or judgment on the merits, or if filed more than 63 days after entry of an order denying reconsideration or rehearing.[21]

12.4.5. *Standard of Review*

In reviewing the findings of the Family Court on appeal from an order terminating parental rights, the court must use the "clearly erroneous" standard on review.[22] That is, the Court of Appeals will affirm the trial court's decision unless it is found to be clearly erroneous.

12.4.6. *Review on the Record; Not de novo*

All appeals from the trial court shall be based on a written transcript of the record made in the court or on a record settled and agreed to by the parties and approved by the court. An appeal shall not be tried de novo.[23]

12.4.7. *Orders Appealed from Presumed to Remain in Full Force and Effect*

The pendency of an appeal from the Family Division of the Circuit Court shall not suspend the order unless the Court of Appeals specifically orders the suspension.[24] Parties cannot finalize orders of adoption, however, until the appellate process is complete.

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18. *Id.*
19 *See* MCR 7.203(A)
20. MCR 7.204(A)
21. MCL 600.867(2); MCR 3.993(C)(2)
22. MCR 3.977(J); *In re Miller,* 433 Mich. 331 (1989)
23. MCL 600.866(1)
24. MCL 600.867(2)

12.4.8. *Collateral Attack*

A party may attack subject matter jurisdiction at any time.[25] In *Hatcher*, the Michigan Supreme Court held that the court's jurisdiction is established by the contents of the petition after the judge or referee has found probable cause to believe that the allegations contained within the petition is true. If the court properly invokes its jurisdiction at the preliminary hearing, subsequent procedural errors do not affect the court's subject matter jurisdiction.

Although a party may attack subject matter jurisdiction at any time, "Here, however, the respondent confuses the distinction between whether the court has subject matter jurisdiction and whether the court properly exercised its discretion in applying that jurisdiction." *** "Generally, lack of subject matter jurisdiction can be collaterally attacked and the exercise of that jurisdiction can be challenged only on direct appeal." The Court established the rule that "the probate [now family division of circuit] court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." Therefore, the court properly assumed jurisdiction and the parents' collateral attack on the court's subject matter jurisdiction was invalid.

12.5. USE OF MINOR'S INITIALS IN PUBLISHED OPINIONS

Former subrule 5.933(C)(2), which required the use of a minor's initials in published opinions, is deleted.

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[25]. *In re Hatcher,* 443 Mich. 426, 437 (1993)